(10)

No. 02-1609

Supreme Court, U.S.
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In the Supreme Court of the United States

CITY OF LITTLETON,

Petitioner,

v.

Z.J. GIFTS D-4, LLC, a Colorado Limited Liability Company d/b/a CHRISTAL'S,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF *AMICUS CURIAE* FIRST AMENDMENT LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Table of Authorities ii

Interest of *Amicus Curiae* 1

Summary of Argument 2

Argument 3

I. The Tenth Circuit Correctly Construed the Court's Prompt Judicial Review Requirement To Mandate A Prompt Judicial Resolution. 3

A. Like the Ordinance at Issue in *FW/PBS*, Littleton's Adult business Licensing Scheme Constitutes a Content-Based, Prior Restraint on Speech 4

B. Prior Restraints Must Include a Guarantee of Prompt Judicial Resolution to Pass Constitutional Muster 8

C. Absent a Guarantee that a Judicial Decision will be Promptly Reached, Licensing Schemes that Target Protected Expression May Be Used as a Subterfuge for Censorship 13

Conclusion 18

Appendix 1a

TABLE OF AUTHORITIES

Cases

Alexander v. United States, 509 U.S. 544 (1993) . . 6

Arcara v. Cloud Books, Inc., 478 U.S. 697 (1986) . 6

Aurilio v. Sweeney, 24 Conn. L. Rptr. No. 7, 222 (Conn. Super. Ct. 1999) 15

Baby Tam & Co. v. Las Vegas, 154 F.3d 1097 (9th Cir. 1998) 4

BJS No. 2, Inc. v. City of Troy, 87 F.Supp.2d 800 (S.D. Ohio 1999) 14

Boss Capital, Inc. v. Casselberry, 187 F.3d 1251 (11th Cir. 1999) 4

Burstyn v. Wilson, 343 U.S. 495 (1952) 3

City News & Novelty, Inc. v. City of Waukesha, 531 U.S. 278 (2001) 4

City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988) 5

Deja Vu of Nashville, Inc. v. Metropolitan Gov't of Nashville and Davidson County, 274 F.3d 377 (6th Cir. 2001), *cert. denied*, 535 U.S. 1073 (2002) . 15

Elrod v. Burns, 427 U.S. 347 (1976) 17

Freedman v. Maryland, 380 U.S. 51 (1965) . . . *passim*

FW/PBS v. City of Dallas, 493 U.S. 215 (1990) . . passim

Lovell v. City of Griffin, 303 U.S. 444 (1938) 5

Nightclubs Inc. v. City of Paducah, 202 F.3d 884 (6th Cir. 2000) 16

Redner v. Dean, 29 F.3d 1495 (11th Cir. 1994) . . . 13, 14

Thomas v. Chicago Park Dist., 534 U.S. 316 (2002) . . . . . passim

TK's Video, Inc. v. Denton County, 24 F.3d 705 (5th Cir. 1994) 17

ZJ Gifts, Inc. v. City of Littleton, 311 F.3d 1220 (10th cir. 2002) 10

Statutes

United States Constitution, First Amendment . . *passim*
Cal. Code of Crim. Procedure § 1094.8 11
Tenn. Code Ann. § 7-5-1110(d) 11-12

Rules

Supreme Court Rule 37.3(a) 1

Other

Adam Goldman, *Competition Hurting Las Vegas Strip: strippers-er, "clubs"*, Cincinnati Enquirer, April 27, 2003, at http://www.enquirer.com/editions/2003/04/27/biz_risquebusiness.html 16

INTEREST OF *AMICUS CURIAE*[1]

The First Amendment Lawyers Association ("FALA") is an Illinois-based, not-for-profit organization comprised of over 150 attorneys who routinely represent businesses and individuals that engage in constitutionally protected expression. FALA's members practice throughout the United States and Canada in defense of the First Amendment and, by doing so, advocate against governmental forms of censorship. Member attorneys frequently litigate the constitutionality of local adult business licensing schemes, often in light of the prompt judicial review requirement that is at issue here. In fact, each of the Court's two previous cases addressing the *FW/PBS* prompt judicial review safeguard were argued by FALA members, and the Respondent in this matter is represented by two FALA attorneys. Given the nationwide span of their experience and the specialized nature of their practices, FALA attorneys can better comment upon the practical application of licensing ordinances like Littleton's than perhaps any other singular person, body, client, or corporate entity.

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[1] This brief was authored in its entirety by counsel for *amicus curiae* First Amendment Lawyers Association ("FALA"). No other person or entity besides FALA, its members, or its counsel have contributed to the costs of preparing and submitting this brief. Counsel anticipate, however, that Deja Vu Nashville, Inc. may offset the printing costs associated with the brief once it has been filed.

Counsel for both Petitioner and Respondent have filed blanket consents to the filing of *amicus* briefs. This brief is therefore submitted pursuant to Supreme Court Rule 37.3(a).

FALA's members have repeatedly observed and battled governmental abuses of licensing ordinances throughout the country, particularly where a prompt judicial determination of the propriety of those abuses is neither guaranteed nor, as in most cases, available at all. Should the Court reverse the decision of the Tenth Circuit and hold that cities need not mandate a prompt resolution of the judicial review process, these abuses are likely to continue. Such a result not only adversely affects the clients of nearly every FALA attorney, but it also contravenes the First Amendment protections FALA and its members are dedicated to preserving.

SUMMARY OF ARGUMENT

The City of Littleton's licensing ordinance conditions the ability of an adult business owner to speak upon the approval of the government and therefore constitutes a prior restraint under *Freedman v. Maryland*, 380 U.S. 51 (1965), and *FW/PBS v. City of Dallas*, 493 U.S. 215 (1990). The Court's decision in *Thomas v. Chicago Park Dist.*, 534 U.S. 316 (2002), fails to undermine that conclusion. *Thomas* analyzed a content-neutral permitting requirement that applied equally to speech and non-expressive activities conducted only in a public park. As such, the ordinance considered in *Thomas* and the Court's analysis of that ordinance are of little value to the issues in this case. Rather, the ordinance here mirrors the adult business licensing scheme treated as a prior restraint in *FW/PBS*. It requires a business owner or other potential speaker to seek and obtain the government's stamp of approval before he can communicate.

To survive constitutional scrutiny, prior restraints like the one enacted by Littleton must include, at a minimum, a provision for prompt judicial review. *Freedman*, 380 U.S. at 51. Merely providing access to the courts in the event a

restraint is improperly imposed is insufficient to satisfy this requirement. Because delay is frequently used as an indirect method of censorship, a judicial decision must be reached within a fixed and reasonable period of time to ensure that speech is not wrongfully suppressed.

ARGUMENT

I. The Tenth Circuit Correctly Construed The Court's Prompt Judicial Review Requirement To Mandate A Prompt Judicial Resolution.

Consistent with the First Amendment, the Court has historically disfavored prior restraints upon protected expression. *See, e.g., Burstyn v. Wilson*, 343 U.S. 495 (1952). While such restraints take various forms, one technique frequently employed by governments to limit speech, either directly or indirectly, is a licensing system. In *Freedman v. Maryland*, 380 U.S. 51 (1965), the Court determined that licensing schemes targeting free expression are unconstitutional unless they contain certain procedural safeguards designed to limit the government's discretion and minimize the length of any restraint. The Court reaffirmed this essential holding twenty-five years later in *FW/PBS v. City of Dallas*, 493 U.S. 215 (1990).

At issue in *FW/PBS* was a Dallas ordinance that required licenses of certain sexually oriented businesses, some of which, as disseminators of expressive materials, were entitled to First Amendment protection and some of which, as mere providers of sexual stimulation, were not. *Id.* at 224. Treating the ordinance as one which "largely targets businesses purveying sexually explicit speech," the Court held that, at a minimum, the ordinance must provide for the prompt issuance of a license and prompt judicial review of an

adverse licensing decision to survive. *Id.* at 228. These protections were deemed necessary even though the ordinance only permitted the licensor to make ministerial decisions, and not an assessment of content, in determining whether to issue a license. *Id.* at 229.

There has been much confusion about the meaning of the prompt judicial review requirement in the fourteen years since *FW/PBS* was decided. *See, e.g., Baby Tam & Co. v. Las Vegas*, 154 F.3d 1097 (9th Cir. 1998) (holding that the prompt judicial review requirement mandates a prompt judicial decision on the merits); *Boss Capital, Inc. v. Casselberry*, 187 F.3d 1251, 1255-1267 (11th Cir.1999) (holding that the prompt judicial review requirement mandates only prompt access to the courts). In fact, the Court has accepted certiorari on two prior occasions in an attempt to resolve the dispute. *See Thomas v. Chicago Park Dist.*, 534 U.S. 316 (2002); *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278 (2001). For the reasons that follow, the First Amendment Lawyers Association believes the Tenth Circuit correctly construed *FW/PBS* to require a prompt judicial resolution, particularly in light of the substantial reality that licensing schemes are often tacitly used to censor protected expression. FALA urges affirmance of that decision.

A. Like the Ordinance at Issue in *FW/PBS*, Littleton's Adult Business Licensing Scheme Constitutes a Content-Based, Prior Restraint on Speech.

A proper assessment of Littleton's licensing ordinance begins with the inquiry into whether it constitutes a content-based prior restraint or a content-neutral time, place, and manner restriction. As a general observation, licensing

mechanisms which condition the ability of a speaker to communicate on the prior approval of the government have systemically been condemned by the Court as prior restraints. *See, e.g., City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988); *Lovell v. City of Griffin*, 303 U.S. 444, 451-52 (1938). Of particular significance here is the *FW/PBS* decision. Because the *FW/PBS* ordinance primarily applied to businesses which convey a sexual message, and then required that those businesses seek the prior approval of the government before opening, it constituted a content-based prior restraint presumed to be unconstitutional. *FW/PBS*, 493 U.S. at 227. No such presumption attaches to truly content-neutral regulations on the method of speech. The recent decision in *Thomas*, wherein the Court excused compliance with the *FW/PBS* procedural safeguards for a park permitting ordinance which did not on its face target speech and which only applied in public areas, is but one example of this relaxed analysis.

Without giving short shrift to the issue, it is obvious from the face of Littleton's ordinance that it constitutes a content-based prior restraint under *FW/PBS* and not, as the City contends, a time, place, and manner restriction under *Thomas*.[2] To be sure, the ordinance applies only to a particular type of business and not to a public location irrespective of the business' intended message. Read together, *Thomas* and *FW/PBS* reject the notion that regulations which target expression in this manner can be treated as content-neutral. Both the *FW/PBS* and Littleton ordinances apply to establishments that convey a similar

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[2] The City's contention in this regard is somewhat ironic, particularly considering that the sole question presented in this case presumes that *FW/PBS* and not *Thomas* applies here.

message or promote a similar theme, namely that of human sexuality, and are therefore content-based.[3] On the other hand, the activities potentially implicated by the park permit requirement in *Thomas* ranged from a baseball game, to a family picnic, to, as was the case, a political rally, none of which shared a common message and some of which were wholly unrelated to speech. *Thomas*, 534 U.S. at 322. For this reason only, the ordinance in *Thomas* was deemed content-neutral and subjected to less stringent constitutional analysis. *Id.*

In traditional time, place, and manner cases, businesses engaged in First Amendment activities may operate at some location or at some period of time without governmental interference. *See, e.g, Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706-707 (1986) (finding no constitutional violation where an adult bookstore precluded from operating at its existing location as a nuisance remained free to relocate elsewhere); *Alexander v. United States*, 509 U.S. 544, 551 (1993) (upholding federal RICO statute against a First Amendment

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[3] The Littleton ordinance also calls upon government officials to make an assessment of content in applying the licensing requirement. First, by limiting the requirement to only those bookstores which devote a "substantial or significant" portion, and not a defined percentage, of their stock in trade, floor space, or advertising costs to sexually explicit material, the ordinance grants discretion to the licensor to determine who should apply and who should not. (Pet. Br. App. 13a-14a.) This decision necessarily turns upon the content of the materials the business sells. In addition, the ordinance permits the City Manager to suspend and ultimately revoke an existing license where "adult entertainment" is provided after hours or where other violations of the regulatory provisions occur. (Pet. Br. App. 31a-32a.) Inherent in this determination is also a consideration of content.

challenge because business owner could "open new stores, restock his inventory, [] hire staff . . . [and] go back into the adult entertainment business tomorrow"). For example, when an adult cabaret is subject to zoning requirements excluding it from the central business district or requiring it to be 1000 feet from a school, it may still locate in an industrial district or near commercial uses without approval from the government. This is not so when a licensing requirement exists. Rather than simply precluding a business from locating in certain areas, a licensing ordinance precludes a business from opening <u>at all</u> without the government's permission. This is a classic prior restraint.

Therein lies the fundamental difference, thus far ignored by the City, between the park permit requirement in *Thomas* and the City of Littleton's licensing scheme. Because the ordinance addressed in *Thomas* applied only to public parks and not to other public fora or private property generally, a speaker denied a permit to communicate his message in the park could nevertheless convey his expression by moving inside the walls of a public building or down the street to private property. The same cannot be said of the Littleton ordinance. Because Littleton's licensing scheme impacts a business' entire ability to operate, and not merely to operate in its desired location, it cannot constitute a time, place, and manner restriction subject to reduced scrutiny under *Thomas*. In addition, because the plain terms of the ordinance apply to speech and not location, it is not, as the City of Littleton espouses, content-neutral.

To say that the ordinance is nevertheless a content-neutral time, place, and manner restriction because it includes within its scope adult uses that deserve no free speech protection, i.e., escort agencies, sexual encounter centers, and the like, is to disregard the Court's clear pronouncement in *FW/PBS*.

To be sure, the Dallas licensing scheme at issue in that case also applied to businesses which arguably fall outside the ambits of the First Amendment, yet the Court treated the ordinance as one which "targets . . . speech." *FW/PBS*, 493 U.S. at 224 (noting that the ordinance applied to "escort agencies and sexual encounter centers" in addition to adult businesses protected by the First Amendment). Equally disingenuous is the argument that an ordinance which permits only ministerial licensing decisions, as opposed to denials based upon content, adequately protects speech such that no judicial review is needed. Justice O'Connor plainly observed that the Dallas ordinance in *FW/PBS* delegated only ministerial functions to the licensor, but still mandated that the ordinance provide swift and meaningful review of the licensor's decisions. *Id.* at 229. *FW/PBS* therefore establishes a rule with regard to prior restraints, to which *Thomas* is the antithesis not the exception. Where a licensing scheme imposes a prior restraint on protected speech, as the Littleton ordinance does, prompt judicial review must be provided.

B. Prior Restraints Must Include a Guarantee of Prompt Judicial Resolution to Pass Constitutional Muster.

The question then becomes what is meant by the term "prompt judicial review"? Is it a prompt judicial determination, as the Tenth Circuit and others have held, or is it merely the ability to access the courts shortly after a license is denied, suspended, or revoked? Both the Court's prior pronouncements and practical concerns about the First Amendment dictate that the former is the more logical and appropriate view.

At its inception, the prompt judicial review requirement was intended to guarantee swift decision-making by the courts. *Freedman*, 380 U.S. at 58 ("because only a *judicial determination* in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a *judicial determination* suffices to impose a valid final restraint") (emphasis added). Undergirding the requirement was the concern that an erroneous license denial without the promise of reversal by a court not only served to directly censor protected material, but might also deter individuals from even attempting to speak at all. *Id.* Given the potential for both direct and indirect censorship, the Court in *Freedman* required not only that prompt judicial review be guaranteed, but that the licensor reach its decision within a fixed, short period of time and that government bear the burden of going to court to prove the correctness of that decision. *Id.* at 58-60.

The concern for suppressed speech lingered in *FW/PBS*, but was insufficient to justify full application of all three *Freedman* guarantees. Because the ordinance at issue in *FW/PBS* required the licensor to perform only the ministerial function of granting or denying a license, and did not permit a consideration of content in reaching that decision, a plurality of the Court determined that the third prong of *Freedman* -- that the government bear the burden of going to court -- need not apply. *FW/PBS*, 493 U.S. at 229-230. In this regard, a plurality of the Court modified the *Freedman* standards to account for the fact that the *FW/PBS* ordinance was not a direct mechanism of censoring a singular, unpopular work, but rather utilized neutral criteria to implement a speech-related licensing scheme. This abbreviated *Freedman* test discounts the original procedural safeguards based on the fact that a licensing scheme, as opposed to a censorial board, is a more indirect method of limiting speech.

Aside from removing the third component of the *Freedman* safeguards, Justice O'Connor's plurality opinion in *FW/PBS* evidences no intent to weaken the prompt judicial review requirement from the prompt decision it originally mandated. The City and its *amici* make much of the terms "availability" and "possibility" that appear on isolated occasions in the opinion, arguing that these terms support a less restrictive interpretation of the requirement. As the Tenth Circuit rightly held, however, these terms refer to the identity of the party invoking the judicial review mechanism and not to the nature of the review itself. *ZJ Gifts, Inc. v. City of Littelton*, 311 F.3d 1220, 1236 (10th Cir. 2002). In Justice O'Connor's estimation, *Freedman* mandates that prompt judicial review be "available" and "possible" in the event of an adverse decision. *FW/PBS*, 493 U.S. at 227-28. These terms refer to the fact that the review is at the speaker's option. If the speaker chooses to seek a prompt judicial resolution, it must be available to him from the courts.

In dispensing with the requirement that the government bear the burden of going to court when no singular work is threatened, the Court acknowledged that a business that cannot operate because its license application was denied has every reason, economically and politically, to pursue judicial review. *FW/PBS*, 493 U.S. at 229-230. The City concedes this distinction, recognizing that the stakes may indeed be elevated when an entire operation, and not merely a single communication, may be suppressed. (Pet. Br. 14.) As a practical matter, it is precisely because so much is at stake that a prompt judicial determination is needed. Unlike *Freedman*, where the speaker's ability to communicate his message through other means or in another forum remained intact, a licensing scheme makes the business owner's entire ability to communicate contingent upon governmental approval. Even the slightest mistake, however honest or

invidious it might be, irreparably silences the speaker and censors the message. The ability to file a lawsuit in court, absent some guarantee that there will be a swift resolution of that suit, in essence promises nothing to those whose speech is stifled under the strong arm of government.

Except in cases of discretionary writs, where the court may decline to review the case at all, the availability of prompt access to the courts is a redundancy. The courts are always open; the clerks always accept filings that conform to the rules and are accompanied by the requisite fee; lawsuits are filed against the government every day. It is precisely because this type of prompt access is inherent in our judicial system that the term "prompt judicial review," when used in a First Amendment context, must mean something more. Otherwise, the requirement offers no protection at all to potentially silenced speakers.

The government complains that it will not be able to comply with a directive that judicial decisions in First Amendment licensing cases be reached promptly. This, it contends, will lead to a complete inability to regulate sexually oriented businesses. Yet the government need not worry that it will be unable to reform state law to ensure a prompt judicial resolution. The number of cities desiring to license sexually oriented establishments is high. (Pet. Br. 38 ("more than 30 cities [in Colorado] employ adult business licensing procedures similar to Littleton's")). Their collective voice will likely have considerable impact upon the state-wide legislative bodies that enact jurisdictional statutes and other rules governing the state courts. In fact, perhaps in anticipation of the Court's ruling on the issue, various states have reformed their state laws in order to provide prompt judicial decision-making in First Amendment licensing cases. *See, e.g.*, Cal. Code of Crim. Procedure § 1094.8; Tenn.

Code Ann. § 7-5-1110(d). Therefore, a decision that the First Amendment requires a prompt judicial determination is not a death blow to the government's supposed interest in combating the secondary effects of adult businesses, as suggested by Littleton and its *amici*.

Equally unfounded is the government's concern that requiring prompt judicial decision-making in adult business licensing schemes will elevate sexual expression over political speech. Notwithstanding *Thomas*, it is safe to presume that, should a city enact a licensing ordinance which on its face targets political or religious uses deserving of the highest form of First Amendment protection, that ordinance will be analyzed under the mandates of *FW/PBS* and *Freedman*. When a city undertakes, however, to impose less restrictive, content-neutral time, place, and manner regulations on speech which occurs on its own property, these regulations will be inspected more flexibly. Indeed, it is the action of the government and not the content of the speech that determines the appropriate level of constitutional scrutiny to apply. In this regard, it was not the political nature of the expression in *Thomas* that dictated the outcome there, nor should the sexual nature of the speech at issue dictate the outcome here. Rather, the focus should be upon the government's conduct and its potential impact upon speech.

The concern for latent censorship, whether by denial of a license or by implicit discouragement of potential speakers from seeking licenses, adheres as much today as it did in *Freedman* and *FW/PBS*. Merely allowing censored speakers to enter the courthouse without requiring meaningful and timely review fails to protect the First Amendment. If there is to be a judicial determination at all, it must be prompt. That was the Court's express pronouncement in *Freedman*, a

ruling which remained unchanged in *FW/PBS*, and that should again be the Court's pronouncement here.

C. Absent a Guarantee that a Judicial Decision Will be Promptly Reached, Licensing Schemes that Target Protected Expression May Be Used as a Subterfuge for Censorship.

It is more than a hypothetical concern that licensing schemes, however ministerial or routine, may result in improper suppression of expression. Actual situations involving *amicus* FALA's members and their clients indicate that this concern is quite real and quite potent.[4] For example, in *Redner v. Dean*, 29 F.3d 1495, 1497 (11th Cir. 1994), a case from Citrus County, Florida litigated by an FALA lawyer, the passage of an adult business licensing scheme was delayed until the day a new adult business was scheduled to open. Despite the fact that the County was seemingly aware of the business and had issued all required building and zoning permits, it waited until the last possible moment to enact an "emergency" adult business licensing scheme. *Id.* When the business refused to comply, the County criminally cited its owner for three of the first four days it was open,

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[4] Part and parcel with this reality is the distinct possibility that the licensor will purposefully and improperly apply content-neutral licensing criteria to affect a content-based result. For example, there is nothing to prohibit a city from erroneously concluding that an applicant is late on his taxes or that he was convicted of a disqualifying crime, thereby silencing the applicant while prolonged judicial review is pursued. Although the government may claim that it will not perform its ministerial functions in such an unscrupulous manner, that promise alone has never been sufficient to adequately protect constitutional interests.

subjecting him to the inconvenience of a trial and the possibility of criminal penalties. *Id.* at 1498. Though the threat of criminal prosecution is generally sufficient to chill future expression, the Citrus County owner persevered through several levels of appeals in the state and federal courts and ultimately succeeded in invalidating the ordinance on constitutional grounds. *Id.* at 1498-99. His ability to express his fully protected message, however, was threatened and chilled for the many years that the case was pending in court.

A similar situation occurred in Troy, Ohio in a case litigated by the undersigned FALA attorney. There, the City enacted a conditional use zoning ordinance the day after an adult cabaret and pool hall opened to the public. The ordinance operated as a prior restraint by requiring a license for the business. *See BJS No. 2, Inc. v. City of Troy*, 87 F.Supp.2d 800, 803-805 (S.D. Ohio 1999). Ten days later, when the business failed to secure a conditional use permit under the new restriction, the City revoked the necessary operational license previously issued to the company. *Id.* at 804. Following an unsuccessful administrative appeal of the revocation, BJS challenged the decision in state court and later by filing a complaint in federal court. *Id.* Shortly thereafter, the City petitioned the state court for injunctive relief against the operation of the business at its current location. *Id.* The state court refused to consider the cabaret's constitutional challenges to the conditional use ordinance and ordered the business closed. *Id.* Not until the federal court ruled the ordinance to be an unconstitutional prior restraint was the cabaret conclusively permitted to engage in its desired,

constitutionally protected form of expression. *Id.* at 809-810.[5]

Perhaps one of the most egregious examples of the misuse of a city's licensing powers occurred in Nashville. While litigation challenging the City's licensing requirement was pending in federal court, the Metropolitan Government of Nashville denied fifteen of the eighteen adult business license applications submitted by businesses who had been unsuccessful in their request for a preliminary injunction. (Agenda, April 27, 1999, FALA Br. App. 1a-8a). Among the reasons given for the denials were unclean couches, a broken toilet, the lack of covered trash cans, and an inadequate supply of hand towels. (*Id.*) The applicants were therefore censored from conveying their protected message until they restocked their restrooms and redecorated their interiors, and only then if they were successful in petitioning the government for adult business licenses. This absurd result occurred under the watchful eye of the federal courts, who ultimately invalidated Nashville's licensing ordinance as a prior restraint. *See Deja Vu of Nashville, Inc. v. Metropolitan Gov't of Nashville and Davidson County*, 274 F.3d 377 (6th Cir. 2001), cert denied, 535 U.S. 1073 (2002). Since the government engaged in this type of pretextual censorship

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[5] As brought to the attention of counsel by another FALA member, the State of Connecticut permits similar results. Per the opinion of the Connecticut Superior Court in *Aurilio v. Sweeney*, 24 Conn. L. Rptr. No. 7, 222 (Conn. Super. Ct. 1999), the decision of a police chief to revoke an occupational license is purely discretionary in nature and is therefore not subject to the state's mandamus procedure. As a result, government officials in Connecticut can now revoke the licenses of protected adult businesses with no justification at all and, in so doing, insulate themselves from being challenged in state court on constitutional grounds.

while being challenged in federal court, it is likely that more egregious abuses occur when the judiciary is otherwise indisposed.

One abuse that often occurs outside the presence of the courts is the chilling effect on speech that intensifies in the wake of increasing governmental intervention. Unlike the businesses attacked in Citrus County, Florida; Troy, Ohio; and Nashville, Tennessee, countless other unknown speakers may elect to forego their right to expression rather than engage in lengthy court battles over the propriety of the government's actions. The Court in *Freedman* recognized the need for judicial finality to avoid this type of self-censorship in the marketplace. *Freedman*, 380 U.S. at 58 (requiring "a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license"). The need is all the more palpable in today's economic climate, where businesses spend upwards of $25 million to build adult cabarets, nightclubs, and bookstores. *See, e.g.*, Adam Goldman, *Competition Hurting Las Vegas Strip: strippers-er, "clubs"*, Cincinnati Enquirer, April 27, 2003, at http://www.enquirer.com/editions/2003/04/27/biz_risquebusiness.html (noting that cost of new gentlemen's club in Las Vegas was $30 million). It is highly unlikely that investors will contribute such large amounts of capital towards a business which may not be able to operate until the conclusion of lengthy court battles, if at all.

Governments sometime argue that the issuance of a temporary license pending the outcome of judicial review can partially alleviate the chilling effect that results when a prompt judicial determination is not guaranteed. *See, e.g., Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, 893 (6th Cir. 2000). That remedy, however, is inadequate to fully protect the First Amendment rights of businesses targeted by

prior restraint licensing schemes. A temporary license can be taken away just as easily as it is granted, with no notice and within a very short period of time. (*See, e.g.*, Pulaski Township Police Department Letter, FALA Br. App. 9a-10a (denying permanent license one month after issuance of temporary license)). Much as prospective speakers will not invest the resources necessary to operate an adult business on the promise of uncertain court proceedings, neither will they contribute towards a temporary license that may not even be in effect long enough to recoup their initial capital investment. In this regard, even a temporary license fails to adequately protect First Amendment rights when not coupled with expeditious judicial decision-making.

Moreover, imposing a temporary license requirement on existing businesses pending the final outcome of a potentially lengthy licensing process improperly alters the status quo under *Freedman*. *See FW/PBS*, 493 U.S. at 227. Most licensing ordinances require temporary license-holders to abide by all licensing regulations, including hours of operation and inspection provisions, while they maintain a temporary license. Requiring an existing business to comply with such burdensome and potentially unconstitutional regulations pending the outcome of an appeal fails to maintain the status quo as required by *Freedman*.[6] Moreover, the adult business will have suffered irreparable harm and will have been subjected to an unconstitutional licensing scheme that suppresses protected expression. *Elrod v. Burns*, 427 U.S. 347 (1976).

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[6] The Fifth Circuit accepted this proposition in *TK's Video, Inc. v. Denton County*, 24 F.3d 705 (5th Cir. 1994).

Absent a rule requiring a swift resolution of judicial proceedings when the government denies a license to engage in protected expression, the First Amendment rights of countless businesses and individuals are at risk of being irreparably harmed. As highlighted by the anecdotes above, governmental entities across the country have shown that they are unable to adequately protect the right to free expression on their own. Licensing schemes are frequently used as a subterfuge for censorship, particularly when controversial, sexual expression is involved. Cities attempt to do indirectly what they cannot do directly. Well-meaning speakers vested with the full protection of the First Amendment are unwittingly silenced. And the courts are, for most, a distant and tedious remedy. The outlook for speech is certainly bleak if the Court declines to recognize the prompt judicial review requirement as a mandate for swift decision-making in First Amendment prior restraint cases.

CONCLUSION

For the reasons set forth in this brief, the Tenth Circuit's decision construing the prompt judicial review requirement to mandate a prompt judicial resolution was not only a correct interpretation of the law, but also the most appropriate outcome to protect the First Amendment. As *amicus curiae*, the First Amendment Lawyers Association urges affirmance.

January 2004

Respectfully submitted,

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APPENDIX A

AGENDA

April 27, 1999
9:00 a.m.

METROPOLITAN ADULT ENTERTAINMENT BOARD
700 SECOND AVENUE SOUTH
HOWARD OFFICE BUILDING NASHVILLE

ELITE REPORTING SERVICES
ANGELA M. SYES, CCR
806 Porter Road
Nashville, Tennessee 37206
(615) 262-9592

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[p. 10]

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Applications for adult entertainment licenses. Deja Vu of Nashville, 1214 Demonbreun Street.

[p. 11]

MS. BORUM: Our recommendation is that it does not comply with health inspections. Some of the items on that health inspection report is: To clean the couches, rest room walls, fixtures, shower stall; repair commode; provide

covered waste containers. Charles, in his inspection, noted a violation of the 3-foot rule.

MR. CHAIRMAN: All right.

MS. SCHAFFNER: I take it the fourth sheet back in the packet is the health inspection report?

MS. BORUM: That is correct.

MS. SCHAFFNER: And that inspection indicates that the couches need to be cleaned. Sanitation of the floors and the cubicles need to be improved. Covered waste containers need to be provided throughout the establishment. The commode in the dressing room needs to be repaired. The rest room walls and fixtures need to be cleaned. And the shower stall in the dressing room needs to be cleaned; is that right?

MS. BORUM: Yes, ma'am, that is correct.

MS. SCHAFFNER: Then . . .

MR. CHAIRMAN: Okay. So that it . . .

MS. SCHAFFNER: Then the inspector's report is the last sheet; is that right?

MS. BORUM: Yes, ma'am.

MS. SCHAFFNER: And the inspector's [p. 12] finding upon inspection was that the dancers were in violation of the 3-foot rule; is that correct?

MS. BORUM: That is correct.

MS. SCHAFFNER: On the codes or building there was no findings since there were no booths; is that right?

MS. BORUM: Yes, ma'am, that is correct.

MS. SCHAFFNER: And as far as the police report, it was approved?

MS. BORUM: Yes, ma'am.

MS. SCHAFFNER: And the zoning was approved?

MS. BORUM: Yes, ma'am.

MS. SCHAFFNER: I move that we deny this application on the basis of the health inspection and the – this board's inspector's report.

MR. CHAIRMAN: It has been moved that we deny this report based on the – deny this application based on the inspector's report and this report from health.

Is there a second?

MS. STEVENS: Second.

MR. CHAIRMAN: Any discussions? All in favor signify by aye.

(All board members voted aye.)

* * *

[p.15]

The next application is Pleasure Palace, 2407 Dickerson Pike.

Ms. Borum.

MS. BORUM: Our recommendation is that it does not comply with health codes. Some of these items were: Repair hand sink; clean walls and all air conditioning vents; clean storage areas; provide towels.

On your checklist sheet from Charles and myself, we received a late report yesterday afternoon from the building inspector who went out and made another inspection and approved the booth requirements.

MS. STEVENS: What does nonconforming mean?

MS. BORUM: Legally, "nonconforming" means that it was there prior to the funding. It's grandfathered in.

MS. SCHAFFNER: I take it that the building inspector's report disapproval since it . . .

MS. BORUM: It is marked disapproved on the checklist. I was handed the report about 5 until 4 yesterday afternoon.

MS. SCHAFFNER: Which disapproves or [p. 16] approves?

MS. BORUM: That approves, as far as the building inspector.

MS. SCHAFFNER: So the only thing that's disapproved, then, is the health . . .

MS. BORUM: That is correct.

MS. SCHAFFNER: . . . report, which includes a need for repairing hand sink for ease of cleaning; thoroughly cleaning the walls in booths and air conditioning vents in the hall; providing a minimum of 10-foot candles of illumination at the floor level in booths; cleaning up storage areas; eliminate all unnecessary items on lower level; and provide hand towels in the bathrooms; is that correct?

MS. BORUM: Yes, ma'am.

MS. SCHAFFNER: I move that this application be denied on the basis of the health report.

MR. CHAIRMAN: It has been moved that this application be denied on the basis of the health report. Is there a second?

MS. STEVENS: Second.

MR. CHAIRMAN: Any discussion?

MR. BANKS: One question, Mr. Chairman. How will – how do they determine what the candle – how do they determine that?

[p. 17]

MS. SCHAFFNER: I think it's a lighting machine, you know, that . . .

MR. BANKS: That they carry with them that determines the lighting?

MS. BORUM: It's measured from the feet.

MR. BANKS: That's all I have.

MR. CHAIRMAN: Okay, all in favor signify by aye.

(All board members voted aye)

MR. CHAIRMAN: Any nays?

Motion carries. This application is denied.

* * *

[p. 26]

MR. CHAIRMAN: The next is Club Platinum, 1711 Hayes Street.

MS. BORUM: We recommend disapproval. It does not comply with health code. Some of those items: Repair toilet; clean showers; eliminate storage that may attract rodents and insects.

MS. CHAIRMAN: Everything else is approved?

MS. BORUM: Yes, sir, everything else is approved.

MS. SCHAFFNER: So that includes repairing the toilet in the men's rest room, cleaning the floors along the lockers in the dressing room?

[p. 27]

MS. BORUM: That is correct.

MS. SCHAFFNER: Cleaning the showers in the dressing room, eliminating storage that may attract rodents and insects and cause – something.

MS. BORUM: Harborage.

MS. SCHAFFNER: What is harborage?

MR. CHARLES WATKINS: Places for rodents or insects to hide.

MS. SCHAFFNER: All right. I move this application be denied based upon the health inspection report.

MR. CHAIRMAN: Do we have a second?

MS. STEVENS: Second.

MR. CHAIRMAN: It has been moved and properly seconded that this application be denied based on the health inspector's report. All in favor say aye.

(All board members voted aye.)

MR. CHAIRMAN: Any nays? Application is denied.

* * *

[p. 43]

* * *

The next application is the Executive Club,

[p. 44]

701 4th Avenue South.

MS. BORUM: We recommend disapproval. It does not comply with health codes. Some of these items: Repair couch, clean rest room floors, provide covered trash cans.

MS. SCHAFFNER: I move this application be denied based on the basis of the health violations.

MR. CHAIRMAN: Is there a second?

MS. STEVENS: Second.

MR. CHAIRMAN: It has been moved and properly seconded that this application be denied based on the health violations. All those in favor signify by – is there any discussion from the board? All in favor signify by aye.

(All board members voted aye.)

MR. CHAIRMAN: Any nays? This application is denied.

* * *

APPENDIX B

PULASKI TOWNSHIP POLICE DEPARTMENT
LAWRENCE COUNTY
R. D. 1, Pulaski, PA. 16143
Phone 652-7610 or 964-8891

February 5, 2001

Eric Boron
1399 Highland Avenue
Salem, Ohio 44460

RE: Application for an Adult Use License
Pulaski Township Ordinance No. 2000-5-22

Dear Mr. Boron:

We have reviewed the application for an Adult Use License dated January 3, 2001 upon which we issued you a "temporary license" pursuant to Section 4 of Pulaski Township Ordinance 2000-5-22. May this letter serve as notice to you that your application for a "permanent license" is denied for the following reasons:

(a) Requirement 18 of the application requires an applicant to state hours of operation. Your application indicates that you will be operating your adult business Monday through Saturday twenty-four (24) hours per day and that the business will be closed on Sundays. Your proposed hours of operation are not in

compliance with Section 18 of Pulaski Township Ordinance 2000-5-22.

(b) Pursuant to an investigation conducted by officials of the Township, individuals have observed Adult Land operating after 10:00 p.m., which is in violation of Section 18 of Pulaski Township Ordinance 2000-5-22.

(c) Pursuant to an investigation of the business on February 2, 2001 the Employee on duty identified herself as Candace Ferguson of 510 N. Jefferson, Lisbon, Ohio 44432. This individual does not have a Temporary Employee License nor has she applied for one. This is in violation of Section 3, A3 of Pulaski Township Ordinance 2000-5-22.

Pursuant to Section 4.F., "Any person aggrieved by the denial, suspension, renewal or revocation of a license may appeal, in writing, within ten (10) days from the date of such denial, suspension, non-renewal or revocation to the Township Board of Supervisors in accordance with the procedures set forth in section 9.0." Specifically, Sections 9.A and 9.B. set forth your appeal rights under the Ordinance.

Very truly yours,

/s/ _____
Chief James B. Morris, Jr.

cc: H. Louis Sirkin
Carl Max Janavitz, Esquire
Richard A. Harper, Esquire